

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK  
OCT 23 2009  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2009-0145-PR
	)	DEPARTMENT B
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
GERALD L. SMITH,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20033819

Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Gerald L. Smith

Florence  
In Propria Persona

\_\_\_\_\_  
V Á S Q U E Z, Judge.

¶1 Petitioner Gerald Smith seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the trial court’s ruling absent a clear abuse of its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the reasons that follow, although we grant review, we deny relief.

¶2 In March 2004, Smith pled guilty to one count of preparatory continuous sexual abuse of a child, a dangerous crime against children. The trial court sentenced him to an enhanced, presumptive prison term of ten years and ordered him to pay \$12,000 in restitution. In May he filed a petition for post-conviction relief,<sup>1</sup> arguing he was entitled to relief based on newly discovered evidence and requesting a specific finding by the court that the sentence imposed was clearly excessive so that he would be eligible to petition for clemency pursuant to A.R.S. § 13-603(L). The trial court denied relief. In October 2005, Smith filed a second petition for post-conviction relief, alleging his counsel in the prior proceedings had been ineffective. After an evidentiary hearing, the court again denied relief.

¶3 In June 2008, Smith filed a third petition for post-conviction relief. He claimed that before entering his change of plea, he did not receive notice that his sentence could be enhanced for an offense that was regarded as a dangerous crime against children and that he was therefore entitled to be resentenced without the enhancement. The trial court denied the

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<sup>1</sup>Included with his petition was a motion to modify sentence pursuant to Rule 24, Ariz. R. Crim. P.

petition. Smith then filed a “motion for reconsideration and amendment to petition,” in which he argued he had not been notified the state had alleged he had committed a dangerous nature offense, the offense should not have been designated a dangerous crime against children, and the court erred in considering “abuse of a position of trust” as an aggravating factor because it was an element of the offense to which he pled guilty. Although the court found each of his claims precluded because they could have been raised in an earlier proceeding, *see* Rule 32.2(a)(1), (2), Ariz. R. Crim. P., it nonetheless addressed the arguments individually, finding them without merit.

¶4 In this petition for review, Smith first contends his claims were not precluded because his sentence was illegal and the trial court therefore lacked jurisdiction to impose it—an issue he maintains he may raise at any time. He also asserts he was not charged with a statutorily enumerated dangerous nature offense and therefore could not be sentenced accordingly.

¶5 Although an illegal sentence constitutes fundamental error, it does not necessarily entitle a defendant to post-conviction relief when raised for the first time in a successive petition. *See Swoopes*, 216 Ariz. 390, ¶ 41, 166 P.3d at 958 (not all fundamental error is of constitutional magnitude requiring defendant’s knowing, intelligent waiver). Rule 32.1(c) provides that an illegal sentence is a ground for post-conviction relief. But, Rule 32.2 does not except claims under Rule 32.1(c) from the rule of preclusion. Because Smith failed

to raise these issues in either of his two prior petitions for post-conviction relief, they are precluded. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶6 Even assuming these claims were not precluded, Smith has not established that his sentence was illegal. He pled guilty to preparatory continuous sexual abuse of a child, which is one of the offenses that is listed as a dangerous crime against children. *See* § 13-705(O), (P)(1)(n).<sup>2</sup> And, the trial court sentenced him to a presumptive, ten-year prison term. *See* § 13-705(C), (J). His sentence was therefore within the range authorized by statute for the particular crime for which he was convicted and thus was not an illegal sentence. *See State v. Carbajal*, 184 Ariz. 117, 118, 907 P.2d 503, 504 (App. 1995) (failure to impose sentence within statutory limits results in illegal sentence).

¶7 As best we can understand Smith’s arguments challenging the enhancement of his sentence, he contends, citing A.R.S. § 13-1423, the offense should not have been classified a “dangerous nature” offense because it did not involve the display of a weapon or the infliction of serious physical injury. And, he asserts that A.R.S. § 13-705 is vague and overly broad because the offenses listed as dangerous crimes against children do not necessarily involve weapons or violence. However, Smith was not charged with violent sexual assault pursuant to § 13-1423, and his sentence was not enhanced as a dangerous

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<sup>2</sup>Significant portions of the Arizona criminal sentencing code have been renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

offense under A.R.S. § 13-704 (involving use of weapon, dangerous instrument or serious physical injury). Neither the charging statute nor the enhancement statute applicable in this case include weapons or serious physical injury. Thus, there is no merit to Smith's argument that § 13-705 is unconstitutionally redundant, vague, and overbroad.

¶8 Additionally, as the trial court found, Smith received proper notice that the state had alleged his offense as a dangerous crime against children. His plea agreement explicitly stated he was pleading to a dangerous crime against children, and the court found in a prior petition for post-conviction relief, of which Smith did not seek appellate review, that his attorney had taken "extra time explaining the plea agreement . . . to him" and the court accepted his attorney's statements that he believed Smith understood the plea agreement. Smith has thus provided no basis upon which we could conclude his sentence was enhanced improperly.

¶9 Smith also claims the trial court "erred in 'double counting' 'abuse of trust' as an aggravating factor for sentencing." This claim, too, is precluded because it could have been raised in a prior petition for post-conviction relief. Ariz. R. Crim. P. 32.1; 32.2. Nonetheless, as Smith suggests, when a potential aggravating factor is an element of the offense for which the defendant was convicted, it may not be used in aggravation. *State v. Tschilar*, 200 Ariz. 427, ¶ 32, 27 P.3d 331, 339 (App. 2001). However, as the court noted below, abuse of the victim's trust is not an element of continuous sexual abuse of a child. Neither the language of the continuous sexual abuse of a child statute nor the predicate

offenses listed therein contains such an element. *See* A.R.S. §§ 13-1405 (sexual conduct); 13-1406 (sexual assault); 13-1410 (molestation of a child); 13-1417 (continuous sexual abuse). It was therefore appropriate for the court to consider this factor in aggravation. *See* A.R.S. § 13-701(D)(24) (court may consider in aggravation “any other factor . . . relevant to defendant’s character or background or to the nature or circumstances of the crime”).

¶10 Smith has not established the trial court’s ruling on his petition amounted to an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Thus, although we grant Smith’s petition for review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge